MALAYSIAN REPORTS

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-254 OF 1989
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
5 JUNE 1990

Contract — Rental agreement — Guarantee relating to harvesting machine — Claim for default rentals and for return of machine — Denial of rental agreement — Claim that harvesting machine sold to the first respondent — Application by respondents for injunction to restrain appellants from taking possession, disposing of or interfering with said harvesting machine — Discretion of court in granting or withholding injunction — Factors relevant for consideration — Damages an adequate remedy

Civil Procedure — Injunction — Discretion of court in granting or withholding injunction — Factors relevant for consideration — Damages an adequate remedy

In this case, the appellants brought an action for alleged defaulted rentals and the estimated value of a harvesting machine or alternatively for the alleged defaulted rentals and the return of the harvesting machine. The claims were based on a rental agreement whereby the harvesting machine was let out to the first respondent. The claim against the second respondent was based on a letter of guarantee relating to the harvesting machine. The respondents in their defence and counterclaim denied there was any rental agreement and averred that the appellants had sold the harvesting machine to the first respondent. The first respondent subsequently applied for an ex parte injunction to restrain the appellants from taking possession, disposing of or interfering with the said harvesting machine. An ex parte injunction was granted and later this was extended until the trial of the action or until the hearing of the appellant's application for final judgment. The appellants appealed.

Held, allowing the appeal:
The respondents in their counterclaim sought for the return of the $90,000 as the sum allegedly paid towards the purchase of the machine and damages and interest. It is clear therefore that this is a case where, even holding the respondents to their counterclaim, damages would be an adequate remedy. Therefore, the injunction was not properly granted. It would be more appropriate to order an early hearing of the application to strike out the counterclaim and the application for summary judgment rather than to grant the injunction.

[Di dalam kes ini perayu telah mengambil tindakan bagi memperolehi sewa yang dikatakan tidak dibayar dan harga taksiran jentera penuaian atau sebagai ganti sewa yang dikatakan tidak dibayar dan pemulangan jentera penuaian itu. Tindakan itu berhubung dengan perjanjian sewa di bawah mana jentera itu telah disewakan kepada responden pertama. Tindakan terhadap responden kedua berhubung dengan surat jaminan mengenai penyewaan jentera itu. Responden di dalam pembelaan dan tuntutan balas mereka tidak mengaku adanya perjanjian sewa dan mereka mendakwa bahawa perayu telah menjual jentera itu kepada responden pertama. Responden pertama telah memohon ex parte mendapat injunksi menahan perayu mengambil balik, menjual atau menganggu jentera itu. Injunksi ex parte itu telah diberi dan ini kemudiannya telah dilanjutkan hingga perbicaraan tindakan itu atau hingga permohonan perayu mendapat penghakiman muktamad didengar. Perayu telah merayu.

Diputuskan, membenarkan rayuan itu:
Responden di dalam tuntutan balas mereka telah memohon pengembalian $90,000 yang dikatakan dibayar untuk membeli jentera itu dan gantirugi dan bunga. Jelaslah bahawa di dalam kes ini memandang kepada tuntutan balas responden gantirugi adalah remedi yang mencukupi. Oleh kerana itu injunksi itu tidak seharusnya diberi. Adalah lebih berpatutan jika diperintahkan supaya permohonan untuk membatalkan tuntutan balas dan permohonan mendapat penghakiman muktamad didengar lebih awal daripada diberi injunksi itu.]

Cases referred to
1 *Hubbard* v *Vosper* [1972] 2 QB 84 (folld)
2 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (folld)
3 *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng* [1978] 1 MLJ 42 (folld)
4 *London & Blackwell Rly Co* v *Cross* (1886) 31 Ch D 354 (folld)

Appeal from: Civil Suit No 23-9-1988 (High Court, Alor Setar)

Mohd Yusuf Khan for the appellants.
Tan Boon Hee for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): We allowed this appeal with costs and now state our grounds.

The appellants/plaintiffs, Associated Tractors Sdn Bhd, in their statement of claim sought for judgment in the sum of $301,165 being the total amount of alleged defaulted rentals and the estimated value of a harvesting machine. Alternatively, the appellants/plaintiffs sought for judgment in the sum of $151,165 being the same alleged defaulted rental and the return of the same said harvesting machine together with interest and costs. The claims were based on a rental agreement dated 31 December 1984 whereby the harvesting machine was let out by the appellants/plaintiffs to the first respondent. The claim against the second respondent was based on a straight forward letter of guarantee relating to the same harvesting machine. Both the rental agreement and the guarantee were exhibited — pp 76-79 and pp 81-82 of the appeal record.

The two respondents in their statement of defence and counterclaim denied firstly there was any rental agreement. The respondents then averred that the appellants/plaintiffs had through their servant and/or agent sold the same harvesting machine to the first respondent at a total price of $225,000 of which a sum of $90,000 had been paid as stated in a document in the form of a saleman's Order No 0364 which was exhibited to support the defence.

On 13 July 1988, the appellants/plaintiffs applied by summons-in-chambers to strike out the counterclaim on

the grounds that it was frivolous and vexatious and/or an abuse of process. This application was not heard as yet when the first respondent on 28 September 1988 applied for an ex parte injunction to restrain the appellants/plaintiffs from taking possession, disposing of or interfering with the same said harvesting machine in the possession of the first respondent. An ex parte injunction was granted. On 4 June 1989, after hearing both parties, the judge extended the injunction to continue until the trial of the action or until the hearing of the appellants/plaintiffs' application for final judgment under O 14 of the Rules of the High Court 1980. Thus the present appeal.

The discretion of the court in granting or withholding an injunction before the trial of an action is governed by established principles. These principles have been developed over the years and the position in law now is that all that the court needs to be satisfied with before exercising the discretion to grant an injunction is that the claim is not frivolous or vexatious. There is no longer a need for the prima facie case test. In other words as long as the court is satisfied that there is a serious question to be tried, that will constitute a basis to proceed to consider whether on the balance of convenience the injunction should be granted. See *Hubbard* v *Vosper*[1] and *American Cyanamid Co* v *Ethicon Ltd.*[2]

Many factors can be relevant for consideration at this stage. It is implied in *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng*[3] that any factor which can tip the balance may be considered and this is referred to at p 42:

> Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits.

The three documentary exhibits in our present case (the rental agreement, the guarantee and the salesman's order) would seem to show clearly that there is a serious question to be tried. The court should not go into the merits at this stage but the three documents on their face value would certainly help to tip the balance one way or the other. Though the defence of non est factum was not pleaded the respondents still denied the rental agreement and the guarantee. The salesman's Order No 0364 carried with it a number of conditions set out at the back of the order and one of the conditions, that is condition No 5, is that the client must adhere to the terms of the payment.

It can also be noticed that the salesman's order was dated 30 November 1984, ie about one month before the dates on the other two documents, ie 31 December 1984. The rental agreement was executed together with the guarantee. This fact is certainly relevant for consideration.

But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly Co* v *Cross*[4] at p 369:

> The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.

The respondents in their counterclaim sought for the return of the $90,000 as the sum allegedly paid towards the purchase of the machine and damages and interest. It is clear therefore that this is a case where, even holding the defendants to their counterclaim, damages would be an adequate remedy. Therefore, the injunction was in our view not properly granted. In a case like this it would be more appropriate to order an early hearing of the application to strike out the counterclaim and the application for summary judgment rather than to grant the injunction. Appeal allowed with costs.

Appeal allowed.

Solicitors: *Yusuf Lee Pathma & Marbeck; Tan Teh & Co.*

Reported by *Prof Ahmad Ibrahim*